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**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 211**

**[Docket DARS-2018-0021]**

**RIN 0750-AJ23**

**Defense Federal Acquisition Regulation Supplement: Use of  
Commercial or Non-Government Standards (DFARS Case 2017-D014)**

**AGENCY:** Defense Acquisition Regulations System, Department of  
Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense  
Federal Acquisition Regulation Supplement (DFARS) to implement a  
section of the National Defense Authorization Act for Fiscal  
Year 2017 by encouraging offerors to propose commercial or non-  
Government standards and industry-wide practices that meet the  
intent of military or Government-unique specifications and  
standards.

**DATES:** Effective **[Insert date of publication in the FEDERAL  
REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kimberly Bass, telephone  
571-372-6174.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published a proposed rule in the *Federal Register* at 83 FR 30644 on June 29, 2018, to implement section 875(c) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328), which requires DoD to revise the DFARS to encourage contractors to propose commercial or non-Government standards and industry-wide practices that meet the intent of military or Government-unique specifications and standards. Four respondents submitted comments on the proposed rule.

## **II. Discussion and Analysis**

DoD reviewed the public comments in the development of the final rule. A discussion of the comments received and any changes made to the rule are provided as follows:

### *A. Summary of Significant Changes*

There were no changes from the proposed rule made in the final rule as a result of the public comments.

### *B. Analysis of Public Comments*

#### *1. Support for the rule*

*Comment:* Two respondents provided support for the proposed rule.

*Response:* DoD acknowledges the support for the rule.

#### *2. Section 875 implementation*

*Comment:* Several respondents shared concerns with DoD's implementation of section 875 of the NDAA for FY 2017, regarding how standards would be added to the Acquisition Streamlining and

Standardization Information System (ASSIST) database in order to implement the statutory requirements. The respondents also recommended revisions to the rule to allow contractors to propose equally effective standards and supporting data for reliance upon standards that meet the intent of the Government's requirements and to require the Government to determine that a commercial or non-Government requirement does not meet a military specification or standard.

*Response:* Maintenance of the ASSIST database is beyond the scope of this rule. Questions regarding standards and the ASSIST database should be directed to the Defense Standardization Program Office. Contact information is available at <https://www.dsp.dla.mil/Contact-Us1/>. Removing the prohibition at DFARS 211.107(b) on DoD using Federal Acquisition Regulation (FAR) 52.211-7, Alternatives to Government-Unique Standards, allows offerors to propose standards as alternatives, as intended. The language in the rule meets the intent of the statute at section 875(c) of the NDAA for FY 2017.

### *3. ASSIST database instructions*

*Comment:* One respondent supported the use of the ASSIST database as a repository of voluntary consensus standards adopted by DoD and recommended additional instructions and clarification on how non-Government standards are selected for inclusion in the database.

*Response:* Maintenance or modification of the ASSIST database is beyond the scope of this rule. Questions regarding standards and the ASSIST database should be directed to the Defense Standardization Program Office. Contact information is available at <https://www.dsp.dla.mil/Contact-Us1/>.

#### *4. Applicability*

*Comment:* Three respondents were concerned by the limitation on applicability of section 875 of the NDAA for FY 2017 requirements to contracts over the simplified acquisition threshold (SAT) and noncommercial contracts.

*Response:* Section III of this final rule preamble clarifies that the rule does not exclude solicitations for contracts valued at or below the SAT. No change to the text of the rule is required, since the proposed rule did not include a limitation to contracts valued above the SAT in the clause prescription. This rule, however, is not applicable to commercial contracts, including COTS, since Government- or military-unique specifications and standards should not be used in commercial contracts.

#### *5. Use of FAR provision 52.211-7*

*Comment:* One respondent was concerned that the existing solicitation provision at FAR 52.211-7, Alternatives to Government-Unique Standards, uses a different standard in determining whether the standard proposed by the contractor is

acceptable. The respondent was also concerned the rule required burden of proof from the contractor to demonstrate the contractor's proposed standard meets the Government's requirement.

*Response:* Although the statute uses the phrase "encourage contractors to propose commercial or non-Government standards and industry-wide practices that meet the intent of the military specifications and standards," DoD retains the responsibility to ensure the requirements are met. Although offerors are encouraged to propose alternative standards, they must be subject to DoD's review and approval. DoD standards ensure that essential mission requirements are met. It is the offeror's responsibility to demonstrate that its proposed alternative standards meet the essential DoD mission requirements.

6. *Revise DFARS clause 252.211-7005*

*Comment:* One respondent recommended revising DFARS clause 252.211-7005, Substitutions for Military or Federal Specifications and Standards, to meet the intent of the requirements in section 875.

*Response:* The rule revises the prescription to require the use of the provision at FAR 52.211-7 when Government-unique specifications and standards are included in DoD solicitations; use of this provision was previously optional. This approach meets the intent of section 875 requirements.

## *7. Revise DFARS 211.201*

*Comment:* One respondent recommended revising DFARS 211.201 to add the new requirements established in section 875, which require military specifications to be used in acquisitions only to define an exact design solution when there is no acceptable commercial or non-Government standard, or when the use of a commercial or non-Government standard is not cost effective.

*Response:* DoD has determined it is unnecessary to revise DFARS 211.201, since the rule removes the prohibition at DFARS 211.107(b). This rule requires DoD to use FAR provision 52.211-7 to permit offerors to propose commercial or non-Government standards and industry-wide practices.

### *C. Other Changes*

A reference to section 875(c) of the NDAA for FY 2017 is added at 211.107(b) and a minor editorial change is made to DFARS 211.201 to revise the name of the database from "DLA ASSIST database" to "ASSIST database".

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and Contracts for Commercial Items, Including Commercially Available Off-the-Shelf Items**

The purpose of this rule is to implement section 875(c) of the NDAA for FY 2017, which requires DoD to revise the DFARS to encourage offerors to propose commercial or non-Government standards and industry-wide practices that meet the intent of

military or Government-unique specifications and standards. The rule does not add any new provisions or clauses; however, to comply with section 875(c), the rule requires DoD contracting officers to use the provision at FAR 52.211-7 in DoD solicitations that include military or Government-unique specifications and standards.

*A. Applicability to Contracts at or Below the Simplified Acquisition Threshold*

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

In accordance with 41 U.S.C. 1905, the Principal Director, DPC, has determined that it would not be in the best interest of the Federal Government to exempt acquisitions not greater than the SAT from the requirements of section 875(c) of the NDAA for

FY 2017. This rule prescribes the use of the provision at FAR 52.211-7 in DoD solicitations that include military or Government-unique specifications and standards, which include those for acquisitions valued at or below the SAT. It is possible that contracts valued at or below this threshold (currently \$250,000), could contain military or Government-unique specifications or standards; therefore, it is necessary and appropriate to include this provision in such contracts in order to give potential offerors an opportunity to propose alternatives to such specifications and standards. Providing such opportunities to offerors may increase competition and ultimately drive down costs associated with compliance with military or Government-unique specifications and standards.

*B. Applicability to Contracts and Subcontracts for the Procurement of Commercial Items, including Commercially Available Off-the-Shelf Items*

10 U.S.C. 2375 governs the applicability of Defense-unique statutes to contracts and subcontracts for procurement of commercial items, including commercially available off-the-shelf (COTS) items. It is intended to limit the applicability of these laws to such contracts or subcontracts. 10 U.S.C. 2375(b)(2) provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment makes a written determination that



it is not in the best interest of the Department of Defense to exempt contracts for the procurement of commercial items, then the provision of law will apply to contracts for the procurement of commercial items. 10 U.S.C. 2375(c)(2) and (d)(2) make similar provisions for subcontracts under contracts for the procurement of commercial items, and for the procurement of commercially available off-the-shelf (COTS) items.

Determinations in accordance with 10 U.S.C. 2375 have not been made. This rule does not prescribe the provision at FAR 52.211-7 for use in solicitations issued using FAR part 12 procedures for the acquisition of commercial items, including COTS, since such contracts should not include military or Government-unique specifications or standards.

#### **IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section

6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **V. Executive Orders 13771**

This final rule is an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

#### **VI. Regulatory Flexibility Act**

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This final rule implements section 875(c) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). The objective of this rule is to require the use of FAR 52.211-7, Alternatives to Government-Unique Standards, in DoD solicitations that include military or Government-unique specifications and standards. This will encourage and permit offerors to propose alternatives to Government-unique standards by using an existing FAR provision. The legal basis for this rule is section 875(c) of the NDAA for FY 2017.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

Based on Federal Procurement Data System data for Product Service Code 5342 (hardware, weapon systems), this rule could potentially apply to approximately 710 unique entities, of which

565 are small businesses. This is based on the number of DoD contract awards in FY 2017. However, of that total, and given the DoD policy of discouraging the use of military specifications and standards in solicitations, this rule would likely impact no more than 40 offerors or potential contractors (the approximate number of DoD contractors involved in major weapons systems). Accordingly, DoD estimates that this rule will have limited impact. Given the fact that some small number of DoD solicitations may include a military or Government-unique specification or standard generally limited to those involving a major weapons system, this rule provides a means for offerors to propose alternatives on a given solicitation.

This rule contains reporting and recordkeeping requirements for those entities that, in response to a DoD solicitation containing military or Government-unique standards, wish to propose voluntary consensus standards that meet the Government's requirements as alternatives to the Government-unique standards. The professional skill sets required are those of mid-level administrative personnel.

There are no known significant alternative approaches to the rule that would meet the requirements of the statute. DoD considers the approach described in the rule to be the most practical and beneficial for both Government and industry.

## **VII. Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB control number 9000-0153, titled, OMB Circular A-119; FAR Sections Affected: 52.211-7 and 53.105.

**List of Subjects in 48 CFR Part 211**

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 211 is amended as follows:

**PART 211—DESCRIBING AGENCY NEEDS**

1. The authority citation for part 211 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Revise section 211.107 to read as follows:

**211.107 Solicitation provision.**

(b) To comply with section 875(c) of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), use the provision at FAR 52.211-7, Alternatives to Government-Unique Standards, in DoD solicitations that include military or Government-unique specifications and standards.

3. Revise section 211.201 to read as follows:

**211.201 Identification and availability of specifications.**

Follow the procedures at PGI 211.201 for obtaining specifications, standards, and data item descriptions from the ASSIST database, including DoD adoption notices on voluntary consensus standards.

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